United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-7638

B

United States Court of Appeals

FOR THE SECOND CIRCUIT

RESTAURANT ASSOCIATES INDUSTRIES, INC.,
Plaintiff-Appellant,

v.

ANHEUSER-BUSCH, INC.,
Defendant-Appellee,

and

SIDNEY SHERMAN and SHERMAN MANAGEMENT CORP. as additional defendants because they are or may be needed for an adjudication pursuant to FRCP 19.

P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT RESTAURANT ASSOCIATES INDUSTRIES, INC.

DORNBUSH MENSCH & MANDELSTAM
Attorneys for Plaintiff-Appellant
22 East 40th Street
New York, N.Y. 10016

RICHARD J. SCHAEFFER
Of Counsel

TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Statement of Facts 4

Issues 9

ARGUMENT:

POINT I—Florida Law Governs the Issues to be Adjudicated in this Litigation 9

POINT II—The Long Letter dated September 24, 1973 was not effective notice of termination under the terms of the Management Agreement and moreover, could, under no circumstances, constitute valid notice of termination because its language was ambiguous and equivocal 10

POINT III—Busch improperly induced Sherman to act in violation of his fiduciary obligations to Associates and is liable to Associates for the damages occasioned to Associates by such improper conduct 17

POINT IV—Busch was obligated to deal fairly and in good faith with Associates in connection with matters affecting Associates agency and Busch's actions in clandestinely inducing Sherman to negotiate with Busch and breach his obligations to Associates are a violation of the fiduciary obligations owed by Busch to Associates as well as a malicious interference with the business relationship between Sherman and Associates 21

PAGE

POINT V—The District Court erroneously entered judgment in favor of Sherman and Sherman Management Corp. 23

POINT VI—Associates is entitled to damages equal to its lost profits in the amount of $158,705 as a consequence of Busch's improper termination of Associates agency and Busch's improper conduct with respect to Sherman 24

Conclusion 25

TABLE OF AUTHORITIES

Cases:

American League Baseball Club of New York v. *Pasquel*, 63 N.Y.S. 2d 537 (S. Ct. N.Y. Cty. 1946) 21

Arcade Steam Laundry v. *Bass*, 159 So. 2d 915 (Fla. 2 D.C.A., 1964) 24

A. S. Rampell, Inc. v. *Hyster Company, et al.*, 3 N.Y.2d 369, 165 N.Y.S.2d 475 (1957) 10, 18, 19, 21

Auten v. *Auten*, 308 N.Y. 155 (1954) 10

Babe, Inc. v. *Baby's Formula Service, Inc.*, 165 So.2d 795 (Fla. 3 D.C.A., 1964) 24

Blackshear Mfg. Co. v. *Umatilla Fruit Co.*, 48 F.2d 174 (5th Cir. 1931) 17

Butterick Pub. Co. v. *Frederick Loeser & Co.*, 232 N.Y. 86, 133 N.E. 361 (1921) 10

Connelly v. *Special Road & Bridge Dist. No. 5, et al.*, 99 Fla. 456, 126 So. 794 (1930) 17, 18

Cudahy Co. v. *American Laboratories, Inc.*, 313 F. Supp. 1339 (D. Neb. 1970) 18

Dade Enterprises, Inc. v. *Wometco Theatres, Inc.*, 119 Fla. 70, 160 So. 209 (1935) 22

PAGE

Duane Jones Co., Inc. v. *Burke, et al.*, 306 N.Y. 172, 117 N.E.2d 237 (1954) 18, 20, 21

Fine v. *Loew*, 159 N.Y.S.2d 318 (S. Ct. N.Y. Cty. 1957) 21

Franke v. *Wiltschek*, 200 F.2d 493 (2d Cir. 1953) 9

Franklin v. *Brown*, 159 So.2d 893 (Fla. 1 D.C.A., 1964) 22

Gregory v. *Stetson*, 10 S. Ct. 422, 133 U.S. 579, 33 L. Ed. 792 (1890) 24

Haag v. *Barnes*, 9 N.Y. 2d 554 (1961)..... 10

Hardware Mut. Casualty Co. v. *Schantz*, 186 F.2d 868 (5th Cir. 1951) 24

Irwin v. *West End Development Co.*, 342 F. Supp. 687 (D. Colo. 1972) 24

John B. Reid & Associates, Inc. v. *Jimenez*, 181 So. 2d 575 (1964) 22

Keegan v. *Humble Oil & Refining Co.*, 155 F.2d 971 (5th Cir. 1946) 24

Kenco Chemical & Mfg. Co. v. *Railey*, 286 So. 2d 272 (Fla., 1 D.C.A., 1973) 25

Klaxon Co. v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) 9

Klosters Rederi A/S v. *Jamaica Sun Tours, Ltd.*, 270 So. 2d 466 (Fla., 3 D.C.A. 1972) 24, 25

Local Union No. 1055, etc. v. *Gulf Power Company*, 175 F.Supp. 315 (N.D. Fla. 1959) 10

Martin Company v. *Commerical Chemists, Inc.*, 213 So. 2d 477 (Fla. 4 D.C.A. 1968) 20

Mead Corporation v. *Mason*, 191 So. 2d 592 (D.C.A. Fla. 1966) 22

McLeod v. *Gaither*, 194 Fla. 55, 113 So. 687 (1927) .. 21

PAGE

New Amsterdam Casualty Co. v. *Utility Battery Mfg. Co.*, 122 Fla. 718, 166 So. 856 (1935) 24

Olins, Inc. v. *Avis Rental Car System of Florida, Inc.*, 172 So.2d 250 (Fla. 3 D.C.A. 1965) 18

Philips v. *Kastens*, 188 N.Y.S. 121 (App. T. 1921) ..10, 12

Singletary v. *Mann, et al.*, 24 So. 2d 718 (Fla. 1946) 18

State ex rel. Harris, et al. v. *Gautier*, 108 Fla. 390, 147 So. 240 (1933) 17, 18

Twyman v. *Roell*, 123 Fla. 2, 166 So. 215 (1936) 24

Van Woy v. *Willis*, 153 Fla. 189, 14 So. 2d, 185 (1943) 17, 18

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 89 S. Ct. 1562, 395 U.S. 100, 23 L. Ed. 2d 129 (1969) rev'd on other grounds 91 S. Ct. 795, 401 U.S. 321, 28 L. Ed. 2d, 77 (1971) 24

Statutes and Rules:

28 U.S.C. § 1332 9

F.R.C.P. Rule 19 3

F.R.C.P. Rule 54 24

Treatises:

2A C.J.S. Agency § 5 21

3 C.J.S. Agency § 318 21

17A C.J.S., Contracts § 402 .....10, 12

56 C.J.S. Master & Servant § 67 18

57 C.J.S. Master & Servant § 625 20

66 C.J.S., Notice § 16 12

5 Scott on Trusts (3rd Edition 1967) § 500 20

6 Corbin on Contracts § 1266 10

17 Am. Jur. 2d, Contracts, § 498 10

United States Court of Appeals
FOR THE SECOND CIRCUIT

RESTAURANT ASSOCIATES INDUSTRIES, INC.,

Plaintiff-Appellant,

v.

ANHEUSER-BUSCH, INC.,

Defendant-Appellee,

and

SIDNEY SHERMAN and SHERMAN MANAGEMENT CORP. as additional defendants because they are or may be needed for an adjudication pursuant to FRCP 19.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT RESTAURANT ASSOCIATES INDUSTRIES, INC.

This is an appeal from a judgment of the United States District Court for the Southern District of New York rendered by Judge Milton Pollack and entered on November 24, 1976.

Preliminary Statement

Plaintiff Restaurant Associates Industries, Inc. ("Plaintiff" or "Associates") had for more than five years managed the food and beverage facilities at Busch Gardens

in Tampa, Florida under successive contracts giving Associates an interest in the profits from those facilities. Busch Gardens is a unique tourist attraction located adjacent to the brewery of and owned by defendant Anheuser-Busch, Inc. ("Busch"). Among the food and beverage facilities managed by Associates was The Old Swiss House ("Swiss House"), a prestige first class restaurant modeled after a famous restaurant of that name owned by members of the family of the wife of August Busch, Jr., retired President of Busch.

During 1975, and without warning or notice to Associates, Busch approached Sidney Sherman ("Sherman"), an Associates key employee and General Manager in charge of its operation at Busch Gardens, and induced him to organize a management corporation and to enter into a management agreement with Busch to perform the same functions as those then being performed by Associates for Busch. As soon as Busch felt it had secured the services of Sherman, it purported to terminate Associates' operations at Busch Gardens. To do so, Busch acted to rewrite history, belatedly characterizing as a notice of termination in May, 1975, a letter written nine months earlier which looked to the continuation of the relationship between the parties, rather than its demise.

Clearly, Busch's purported notice of termination was ineffective to alter the relationship between the parties. However, threatened with eviction from the peaceful and quiet enjoyment of Swiss House and the destruction of its interest in the profits earned by its operation, Associates commenced this action for: (a) damages based upon Busch's purported termination of the contract and its improper inducement of Sherman in violation of its fiduciary duties and; (b) injunctive relief which sought to prevent Busch; (i) from interfering with Associates' management and operations at Swiss House for the duration of the agreement between Busch and Associates; and (ii) from

carrying out the agreement which Busch had entered into with Sherman and Sherman's newly organized corporation which provided that Sherman replace Associates in the operation and management of Swiss House. Sherman and Sherman Management Corp. were named as additional defendants because it was believed that they were or might have been indispensable parties as respects the injunctive relief sought by Plaintiff pursuant to Rule 19 of the Federal Rules of Civil Procedure but no monetary damages were requested as against either of them. In any event, neither Sherman nor Sherman Management Corp. was ever served with process in this action and are not parties to this action.

Associates commenced the action on June 20, 1975 and on June 23, 1975, moved by order to show cause for a preliminary injunction enjoining Busch from undertaking to terminate the management operation by Associates of the food and beverage facilities at Busch Gardens it was then managing and from interfering with Associates' rights in connection therewith. A temporary restraining order was granted and a hearing on Associates application for a preliminary injunction was set down for July 8, 1975. At the conclusion of the hearing the motion was denied by decision and order of the District Court, dated July 9, 1975 (A-176 to A-186).* In accordance with that order, Associates terminated its management of Swiss House on July 9, 1975 and Sherman and his corporate entity have managed Swiss House since that date.

Following the denial of Plaintiff's application for a preliminary injunction the parties completed pre-trial discovery and entered into the Pre-Trial Order (A-365 to A-385) Plaintiff withdrew its prayer for injunctive relief and sought solely monetary damages against Busch. The

---

* References to page numbers with the prefix "A" are to pages of the Joint Appendix.

trial was held on September 21, 1976 and on November 23, 1976 Judge Pollack filed his decision directing that judgment be entered in favor of the defendants* and against Plaintiff.

Statement of Facts

The October 22, 1969 Agreement

Busch was dissatisfied with the operation, by an independent food service company, of the food and beverage facilities located in Busch Gardens. In 1969, Busch requested Associates, a public company whose principal business is the operation and management of restaurants and food and beverage facilities, to assume responsibility for the operation of both Swiss House and the so-called "fast food" facilities consisting of snack bars, food stands and food carts, all located in Busch Gardens. A contract was entered into on October 22, 1969 and on December 4, 1969 Associates commenced to operate Swiss House as well as the fast food facilities located at Busch Gardens. The October 22, 1969 agreement provided for an initial term of two years. Pursuant to the October 22, 1969 contract, Associates retained one-half of the net profit from those operations.

Prior to the expiration of the October 22, 1969 agreement, Associates and Busch agreed to structure a new relationship. However, the October 22, 1969 agreement was extended by letter to December 25, 1971 and it was informally agreed that the terms of such new agreement, as would be reached between Associates and Busch, would be effective as of December 26, 1971. A written contract was not signed until on or about May, 1973, although it is dated December 8, 1972 and recites that it is effective December 26, 1971. (A-417 to A-430).

---

* The reference to defendants is difficult to understand in light of the fact that Busch was the only party defendant to the action and this fact is referred to in the decision (A-582).

The December, 1972 Agreement

The December 8, 1972 agreement (the "Management Agreement") provided in pertinent part that Associates would: (1) peaceably and quietly enjoy the operation and management of Swiss House and the fast food facilities (Par. 7, Preamble); (2) collect all gross receipts and pay all operating expenses (Par. 3c) including percentage rent to Busch (Par. 1(d) (v); and (3) thereafter retain operating profits (Par. 5). The initial term of the Management Agreement began on December 26, 1971 and terminated two years thereafter (Par. 4(a)). However, Par. 4(b) of the Management Agreement provided for automatic renewal for an additional term of one year upon the same terms and conditions (including the renewal provision) unless either party gave written notice of termination to the other not less than ninety (90) days prior to the expiration of the initial term or additional term. All notices were required to be given in a specified manner (mailed by registered or certified mail to the addresses set forth in the agreement) and directed to the attention of designated officers (Par. 14). The Management Agreement provided that it could be amended only by a written instrument and that it was to be governed by and interpreted in accordance with Florida law (Par. 17).

Busch Initiates Discussions Looking to a Modification of the Management Agreement

During 1973, after the execution of the Management Agreement, the parties discussed making changes in the Management Agreement. In that regard, on or about September 17, 1973 James R. Bickle, an employee of Busch, sent a letter to Verne Clements (A-525), an employee of Associates (a copy of which letter was sent to Ralph Tolve, a Vice President of Associates) in which he expressed Busch's desire to arrange for a meeting in October, 1973 to discuss certain points of the Management Agreement

which Busch felt were in need of modification. Scarcely a week thereafter, Dennis P. Long, a Vice President of Busch, sent a letter, by ordinary mail, (A-503) informing Tolve that Busch desired to renegotiate certain terms of the Management Agreement and that Bickle would be contacting Tolve shortly in order to conclude negotiations with respect to the desired modifications. Although the letter made reference to Paragraph 4(b) of the Management Agreement it did not state an intention on the part of Busch to terminate the Management Agreement but rather, coming on the heels of Bickle's letter, served as a confirmation of Busch's desire to renegotiate certain portions of the Management Agreement. The letter was sent by ordinary mail, was directed to the wrong corporation and was not received by Tolve until September 27, 1973, less than ninety (90) days prior to the expiration of the initial term of the Management Agreement.

After September 24, 1973 the parties continued to engage in negotiations as respects the terms of the Management Agreement and orally agreed to and implemented certain modifications of the Management Agreement although the Management Agreement was the last written agreement made by the parties.

On August 1, 1974 Bickle sent a letter to Clements (A-468) by registered mail, return receipt requested, which letter stated "As provided in our Agreement we are hereby giving written notice of proposed changes in the upcoming operating contract . . .". This letter was sent to Clements and not to Tolve and once again failed to manifest an intention on the part of Busch to terminate the Management Agreement. Thereafter Busch submitted a proposed draft of a new management agreement to Associates (A-431 to A-446) and Associates responded by submitting its proposed draft of a new management agreement to Busch (A-447 to A-465).

Sidney Sherman

On or about January 1, 1974 Sherman was chosen by Associates as its General Manager for Operations at Busch Gardens, a position he occupied until July 9, 1975. Sherman, a valued employee of Associates, had previously been employed by Associates as Banquet Manager and maitre d' of the Tavern-on-the-Green restaurant in New York City for approximately eight years. Sherman's duties at Busch Gardens included overall responsibility for and supervision of all the activities engaged in by Associates at Busch Gardens and included participation in negotiations with representatives of Busch as respects the management by Associates on behalf of Busch of the food and beverage facilities at Busch Gardens.

During January, 1975 representatives of Busch commenced negotiations with Sherman as respects management by Sherman on behalf of Busch of Swiss House. (It should be noted that on November 4, 1974, pursuant to the agreement of the parties, Associates turned over the management and operation of the food and beverage facilities at Busch Gardens, except for Swiss House, to Busch. Busch had orally agreed that in consideration of that act Associates would continue as manager and operator of Swiss House until at least November 4, 1976, a promise which they reneged upon). Sherman, who was then, and continued until July 9, 1975 to be, General Manager for Operations at Swiss House for Associates engaged in negotiations with Busch, which negotiations culminated in the execution of an agreement between Busch and Sherman Management Corporation, Inc. (a corporation formed and wholly-owned by Sherman) providing for the management of Swiss House by Sherman in place of Associates. Neither Busch nor Sherman felt it necessary or appropriate to reveal their negotiations to Associates nor for that matter to inform Associates of the agreement which had been reached between them.

The Long Letter Dated May 21, 1975

After having reached an agreement with Sherman and thereby assuring the continued operation of Swiss House without any business interruption, Busch arranged for a meeting in New York with Tolve on May 27, 1975. At that time Bickle handed Tolve a letter signed by Long (A-470), which referred to Bickle's August 1, 1974 letter and stated that that letter, the August 1, 1974 letter, was the notice of termination of the Management Agreement and that Associates' agency would terminate on June 30, 1975. Sherman continued as Associates' General Manager for Operations at Busch Gardens through July 9, 1975 at which time, upon the District Court's denial of Associates' application for a preliminary injunction, he took over as the manager of Swiss House.

Sherman Management Corporation, Inc. has managed Swiss House on behalf of Busch since July 9, 1975 and between that date and December 25, 1975 Swiss House had gross receipts of $761,496. The uncontradicted evidence at the trial established that Associates would have realized a profit equal to 20.8 per cent of the gross receipts of Swiss House for the period between July 9, 1975 and December 27, 1975, or $158,705 (A-391 to A-398, A-564).

By the decision of Judge Pollack dated November 23, 1976 the District Court held: (a) that the Long letter of September 24, 1973 (A-503) terminated the Management Agreement and that the arrangement thereafter was only one of an agency at will, terminable upon reasonable notice and that Busch was not liable to Associates for terminating its right to manage Swiss House as of July 9, 1975, and (b) that Busch's conduct with respect to Sherman was not actionable under any theory.

Issues

1. Was the District Court in error in holding that the Long letter of September 24, 1973 terminated the Management Agreement, when the evidence established that the letter did not comply with the termination provisions of the Management Agreement, did not manifest an unequivocal and unambiguous intention to terminate the Management Agreement, and was not viewed by either of the parties as a letter of termination?

2. Was the District Court in error in holding that Busch's conduct with respect to Sherman was not actionable under any theory when the evidence established that Busch induced Sherman to breach his duties of loyalty and fidelity to Associates in violation of his fiduciary obligations to Associates?

3. Was the District Court in error in holding that judgment should be entered in favor of Sherman and Sherman Management Corp. and against plaintiff when neither Sherman nor Sherman Management Corp. was a party to the action?

ARGUMENT

POINT I

Florida law governs the issues to be adjudicated in this litigation.

The jurisdiction of the federal courts is based on diversity of citizenship under 28 U.S.C. § 1332. Accordingly, this court must look to the law of the forum for the controlling principles of substantive law, including New York's choice of law rules. *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Franke* v. *Wiltschek*, 200 F.2d 493 (2d Cir. 1953). New York will honor the parties' choice of the

state law by which their agreement is to be governed where the state whose law is chosen has at least a reasonable interest in the outcome of the litigation because of its connection with the controversy. *Auten* v. *Auten*, 308 N.Y. 155 (1954); *Haag* v. *Barnes*, 9 N.Y.2d 554, 559-60 (1961); *A. S. Rampell* v. *Hyster Company*, 3 N.Y. 2d 369, 165 N.Y.S. 2d 475 (1957).

The parties here in two successive written contracts provided that the agreement between them ". . . shall be governed by and interpreted in accordance with the laws of the State of Florida." Moreover, this case concerns a relationship which clearly has its nexus in the State of Florida. Accordingly, this Court must look to the Florida law in order to adjudicate the issues presented in this litigation.

POINT II

The Long letter dated September 24, 1973 was not effective notice of termination under the terms of the Management Agreement and moreover, could, under no circumstances, constitute valid notice of termination because its language was ambiguous and equivocal.

A contract is terminable in the manner agreed to between the parties. *Local Union No. 1055, etc.* v. *Gulf Power Company*, 175 F. Supp. 315 (N.D. Fla. 1959). When the time and manner of exercising a power of termination is specified in a contract the party attempting to exercise the power of termination must serve notice in the form and manner and at the time specified in the contract—any attempt to exercise the power of termination by a notice which does not strictly comply with the provisions of the contract is ineffectual. *6 Corbin on Contracts § 1266; 17A C.J.S., Contracts § 402; 17 Am. Jur. 2d, Contracts § 498; Philips* v. *Kastens*, 188 N.Y.S. 121 (App. T. 1921); *Butterick Pub. Co.* v. *Frederick Loeser & Co.*, 232 N.Y. 86, 133 N.E. 361 (1921).

The terms of the Management Agreement empowered either party to terminate the contract after the initial term (or at the expiration of any additional term) by giving written notice to the other party that the agreement shall terminate at the end of the initial term (or additional term), which such notice was required to be given not less than ninety (90) days prior to the expiration of the initial term (or additional term). Such notice was required to be in writing and forwarded by registered or certified mail to the other party (and in the case of Associates, to the attention of Tolve) and any such notice was to be deemed effective and served as of the date of the certified or registered mailing thereof.

The letter of September 24, 1973 (A-503) failed to comply with these rather straightforward requirements of the Management Agreement in the following respects and, therefore, was not effective to terminate the Management Agreement:

(a) The Management Agreement provided that the party seeking to terminate the agreement shall give notice that "the agreement shall terminate at the end of the initial term or additional term". The letter of September 24, 1973 stated that Busch desired to renegotiate certain terms of the Management Agreement—it did not express an intention on the part of Busch that the agreement shall terminate on December 25, 1973. To the contrary, the letter stated that Bickle would contact a representative of Associates in order to conclude negotiations with respect to certain terms of the Management Agreement. Moreover, quite aside from the contractual provision for notice of termination contained in the Management Agreement, the letter could not stand as an effective notice of termination because of its patent ambiguity. Although the letter made reference to the fact that the Management Agreement was scheduled to terminate on December 25, 1973, it was, in effect, a notice of renegotiation and not a notice of ter-

mination. The contents of the letter were equivocal and ambiguous and reasonable men could differ upon the interpretation to be placed upon the letter. It is hornbook law that a purported notice in order to be effective to terminate an agreement must be clear, unequivocal and in strict accordance with the terms of the agreement. *66 C.J.S., Notice § 16; 17A C.J.S., Contracts § 402.*

(b) Paragraph 4(b) of the Management Agreement provided that the party seeking to terminate the Management Agreement was required to give written notice to the other party. Paragraph 14 of the Management Agreement provided that all notices be forwarded by registered or certified mail. The letter of September 24, 1973 was sent by ordinary mail, and not by registered or certified mail. This failure to comply with the requirements of the contract rendered the purported notice ineffective. *Philips* v. *Kastens,* 188 N.Y.S. 121 (App. T. 1921). In the commercial world businessmen attach a certain significance to correspondence which is received via certified or registered mail which is not attached to pieces received in the ordinary course of the mail. It might very well have been for that reason that the authors of the Management Agreement provided for notices to be sent in that special way. Therefore, the fact that the letter was concededly received by Associates is of no importance—what is important is that it was not received by registered or certified mail and that fact, especially when considered together with the inconclusive language of the letter, could, and in fact did, lead Tolve, a business executive, to construe the letter as an invitation to renegotiate certain portions of the agreement and not as a legally operative instrument to terminate the agreement.

(c) The Management Agreement provided that the notice of termination had to be sent to the other party. Restaurant Associates Industries, Inc., a Delaware corporation, is a party to the Management Agreement. The

letter of September 24, 1973 was sent to Restaurant Associates, Inc., a New York corporation. Once again the failure to strictly comply with the requirements of the Management Agreement rendered the purported notice ineffective.

(d) Even if the letter was intended to effect a termination of the agreement, it was not timely served, if served at all. Paragraph 14 of the Management Agreement provided that notices shall be deemed effective and served as of the date of certified or registered mailing thereof. Since the notice was not sent by registered or certified mail pursuant to the terms of the agreement it was not effective nor had it been served and, therefore, could not operate to terminate the Management Agreement. Moreover, the letter was received by Tolve on September 27, 1973 which was less than ninety (90) days prior to the expiration of the initial term of the Management Agreement and was, therefore, not in compliance with the requirements of the Management Agreement.

The circumstances in existence immediately prior to the sending of the September 24, 1973 letter and following the receipt of that letter indicate that neither of the parties viewed the letter as a notice of termination.

On August 6, 1973 Long prepared an inter-office correspondence for August A. Busch, III, the President of Busch. That memorandum (A-559 to A-561) set out various alternatives relating to management of Swiss House after December 25, 1973. Long recommended that the contract with Associates should be extended and that it should not be removed as operator of Swiss House.

On September 17, 1973 Bickle wrote a letter to Clements and sent copies to Tolve and Long (A-525). In that letter, sent approximately one week before the Long letter of September 24, 1973, Bickle made reference to some points

in the Management Agreement which were in need of modification and asked that the letter be considered an "official indication" of Busch's desire to arrange for a meeting *in October* to discuss these changes. It is noteworthy that Bickle suggested that the meeting take place in October, the month following the deadline by which Busch would have had to notify Associates of its intention to terminate the agreement effective December 25, 1973. As stated above, a copy of this letter was sent to Tolve and within the next week to ten days thereafter he received the Long letter of September 24, 1973. Under those circumstances it was perfectly natural that Tolve would have regarded the Long letter as a confirmation, in effect, of the earlier Bickle letter, that certain provisions required modification and not as a notice of termination.

On December 11, 1973 Bickle sent an inter-office correspondence to Long (A-526 to A-528) in which he stated that the expiration date of the contract with Associates was set at December 26, 1974. Bickle had previously received a copy of Long's letter of September 24, 1973 to Tolve (which the District Court held terminated the Management Agreement as of December 25, 1973) and nonetheless, his memorandum stated that the contract was set to expire on December 26, 1974. Moreover, although Long made a number of hand written comments on the document he made no written entry with respect to the Bickle statement that the contract was set to expire on December 26, 1974.

On January 29, 1974 Long sent an inter-office correspondence to August A. Busch, III (A-531 to A-533) in which he informed Mr. Busch that Busch had extended the contract with Associates through November 4, 1974 and further, that Busch intended to notify Associates on August 5, 1974 that Busch had a new contractor for the Swiss House. This memorandum, as are the following memoranda, is totally inconsistent with Long's sworn testimony

(at the preliminary hearing and at his deposition) that he intended to and did terminate the Management Agreement by his letter of September 24, 1973.

On August 1, 1974 Bickle sent a letter to Clements (A-468) by registered mail, return receipt requested in which he stated: "As provided in our Agreement we are hereby giving written notice of proposed changes in the upcoming operating contract with Restaurant Associates Industries, Inc." It is clear by the capitalization of the letter "A" in the word "Agreement" that Bickle was referring to a particular document and that document could only be the Management Agreement.

On September 18, 1974 Busch sent a proposed draft of a new management agreement to Associates (A-431 to A-446). On September 26, 1974 Long sent an inter-office correspondence to Bickle (A-534 to A-535) in which he stated:

> "VII. Finally . . . tell R.A. we want a signed contract—ON TIME.

Long's use of the words "ON TIME" in this memorandum demonstrates that the Management Agreement had not been terminated (by the letter of September 24, 1973) but had been extended beyond December 26, 1973. It is clear that Long never viewed that letter as a termination letter and this fact is confirmed by an inter-office correspondence dated October 30, 1974 from Long to Bickle (A-536 to A-537) which states: "As I understand it . . . the *contract* with RA expires this week." (emphasis added). In response to questions relating to what contract he was referring to in that document Long testified that he couldn't "recall exactly" but he believed he was making reference to a "moral contract, my business obligation to them; not the written Agreement, not the legal contract . . ." (A-336 to A-339).

Finally, on May 27, 1975 Bickle hand-delivered a letter dated May 21, 1975, signed by Long (A-470) to Tolve. That letter, in relevant part, stated:

> "Re: Agency Agreement dated December 8, 1972 between Anheuser-Busch, Incorporated and Restaurant Associates Industries, Incorporated involving the operation of The Old Swiss House restaurant.
>
> Dear Mr. Tolve:
>
> By letter of August 1, 1974, we notified you of our intent to terminate the subject agreement as to the terms and conditions then in effect. As we have since been unable to reach agreement as to mutually acceptable terms upon which to continue our relationship, this letter is to notify you of the termination of your agency effective midnight June 30, 1975."

That letter made no reference to Long's own earlier letter of September 24, 1973 and to the contrary, advised that Busch was relying upon Bickle's letter of August 1, 1974 to Clements (A-468) as the notice of termination. It is apparent that only after Busch realized that the Bickle letter could not be viewed as sufficient notice of termination that it put forward the Long letter of Sepember 24, 1973 in a last-ditch effort to justify its improper actions in terminating the Management Agreement, effective June 30, 1975.

In conclusion, the credible evidence and documentary proof establish that:

(a) The Long letter of September 24, 1973 (A-503) was neither intended, nor was it effective as a notice of termination of the Management Agreement; and

(b) Busch's purported termination of Associates' agency at Swiss House as of June 30, 1975 was in violation of the Management Agreement.

POINT III

Busch improperly induced Sherman to act in violation of his fiduciary obligations to Associates and is liable to Associates for the damages occasioned to Associates by such improper conduct.

Sherman had been employed by Associates between 1965 and 1973 as Banquet Manager and maitre d' of the Tavern-on-the-Green restaurant in New York City. On or about January 1, 1974 Associates chose Sherman to become its General Manager for Operations at Busch Gardens, a position which he held until July 9, 1975. His duties in that position included overall responsibility and supervision of all of the activities engaged in by Associates at Busch Gardens. He was responsible, among other things for the financial management of the business, he negotiated the terms of the collective bargaining agreement on behalf of Associates with the union representing the employees of Swiss House and he participated in the negotiations with representatives of Busch as respects the conditions pursuant to which Associates managed and was to continue to manage Swiss House. There can be no question but that Associates trusted and reposed confidence in Sherman and relied upon him to faithfully and diligently carry out his duties. Although Sherman had the responsibility to report to his supervisor, Clements (who was responsible for a number of locations both within and without the State of Florida) Sherman was, in fact, the individual in charge of Associates' operation at Busch Gardens. The law imposes upon an agent a duty of diligence, good faith and fidelity and a requirement to act solely for the benefit of his principal in matters concerned with the agency. *Blackshear Mfg. Co.* v. *Umatilla Fruit Co.*, 48 F.2d 174 (5th Cir. 1931); *Connelly* v. *Special Road & Bridge Dist. No. 5, et al.*, 99 Fla. 456, 126 So. 794 (1930); *State ex rel. Harris, et al.* v. *Gautier*, 108 Fla. 390, 147 So. 240 (1933); *Van Woy*

v. *Willis*, 153 Fla. 189, 14 So.2d 185 (1943); *Olins, Inc.* v. *Avis Rental Car System of Florida, Inc.*, 172 So.2d 250 (Fla. 3 D.C.A., 1965); *Singletary* v. *Mann, et al.*, 24 So.2d 718 (Fla. 1946); *A.S. Rampell, Inc.* v. *Hyster Company, et al.*, 3 N.Y.2d 369, 165 N.Y.S.2d 475 (1957); *56 C.J.S. Master & Servant § 67.*

A servant is chargeable for a breach of duty if without the knowledge and consent of his master he engages in a transaction which tends to bring his personal interest into conflict with his obligation as a fiduciary agent. *Connelly* v. *Special Road & Bridge Dist. No. 5, et al., supra; State ex rel. Harris* v. *Gautier, supra; Duane Jones Co., Inc.* v. *Burke, et al.*, 306 N.Y. 172, 117 N.E. 2d 237 (1954). Moreover, it is the duty of an agent to communicate to his principal facts relating to the principal's business, which ought, in good faith, be made known to the latter and to disclose any facts or circumstances which might make the agent's interest adverse to the principal's interest. *Connelly* v. *Special Road & Bridge Dist. No. 5, et al., supra; Van Woy* v. *Willis, supra; Cudahy Co.* v. *American Laboratories, Inc.*, 313 F.Supp. 1339 (D. Neb. 1970).

Sherman clearly breached his fiduciary duty to Associates by bringing his personal interests into conflict with his obligations to his employer. Sherman was aware that Associates was negotiating for an extension of its agreement with Busch because he himself participated in those negotiations and made certain suggestions to Associates' counsel in connection with the proposed new agrement (A-493). Among other acts or omissions, Sherman breached his duty to Associates by:

(a) negotiating with Busch for an agency to replace Associates at Swiss House. Sherman without the knowledge and consent of Associates engaged in a transaction which brought his personal interest into conflict with his obligations as a fiduciary. Sherman testified that he was informed by Busch in May, 1975 that Busch had decided

to terminate Associates' agency at Swiss House (A-85 to A-89). The documentary evidence established that Sherman was negotiating with Busch as early as January, 1975 (A-538 to A-539) and had reached agreement with Busch by April, 1975 (A-540 to A-542). Sherman placed himself in direct competition with his principal as respects the subject matter of the agency.

(b) aiding Busch in its plan to place itself in a favored position for the termination of Associates' agency, without a break in Swiss House operations, for the purpose of injuring Associates and destroying its business at Swiss House. In *A.S. Rampell, Inc.* v. *Hyster, supra* the New York Court of Appeals found that similar actions by an employee were not merely planning for new employment after leaving plaintiff's employ but were acts committed on the time of the employer and were intended to interfere with the then existing agreements between the employer and the third party and that such a plan was deliberately designed to destroy the employer's business; and

(c) failing to communicate to Associates facts relating to Associates' business and to disclose circumstances which might make his interest adverse to Associates. A memorandum prepared by Bickle on January 28, 1975 based upon his conversations with Sherman (A-539), memorializes the fact that Sherman was indeed nervous about any such disclosures being made and Sherman's letter to Mr. Bickle dated May 13, 1975 (A-545) reiterates Sherman's concern that the agreement be signed between Sherman and Busch the same or following day that he notifies Associates as to what has happened. Sherman acted solely for his own benefit in matters concerning the agency and is liable to Associates for his failure to carry out his fiduciary obligations.

Busch is jointly liable with Sherman for the damages occasioned to Associates. Where a third party deals with an agent with knowledge that the agent is acting in viola-

tion of his fiduciary obligation to his principal, the third-party is jointly liable with the agent for the damages occasioned to the principal. *Martin Company* v. *Commercial Chemists, Inc.*, 213 So. 2d 477 (Fla. 4 D.C.A., 1968); *57 C.J.S. Master & Servant* § *625; 5 Scott on Trusts* (3rd Edition 1967) § 500; *Duane Jones Co., Inc.* v. *Burke, et al., supra.*

Associates is entitled to the actual losses sustained by it as a result of Busch's wrongful conduct. There is no evidence that, during 1975, Busch was engaged in negotiations with any other person (other than Sherman) or business entity as respects a successor manager to Associates at Swiss House. Moreover, there is evidence that in or about May, 1974 Busch offered Sherman an opportunity to replace Associates as operator of Swiss House (A-93 to A-95). Sherman, consistent with his fiduciary obligations, refused such offer and Busch retained Associates as manager of Swiss House. It can reasonably be inferred that if Busch had not induced Sherman to violate his fiduciary duties and enter into an agreement with it, that Associates would have remained as operator of Swiss House through the then current term year which terminated on December 25, 1975. Accordingly, Associates is entitled to recover damages for its loss of anticipated future profits during the period between July 9, 1975 and December 25, 1975.

POINT IV

Busch was obligated to deal fairly and in good faith with Assoicates in connection with matters affecting Associates' agency and Busch's actions in clandestinely inducing Sherman to negotiate with Busch and breach his obligations to Associates are a violation of the fiduciary obligations owed by Busch to Associates as well as a malicious interference with the business relationship between Sherman and Associates.

Agency is generally considered to be a fiduciary relation —a relation of trust and confidence in which the utmost good faith is required. *2A C.J.S. Agency § 5.* A principal is required to deal squarely and in good faith with the agent as respects the subject matter of the agency. *McLeod* v. *Gaither,* 194 Fla. 55,113 So. 687 (1927); *3 C.J.S. Agency § 318.* The relationship between Associates and Busch was not one of competition between equals, rather there was a dependency by Associates upon Busch. Busch was prohibited, as a consequence of this relationship of confidence, to interfere with Associates' contractual relations with its employee, Sherman, and Busch's flagrant violation of its fiduciary duties renders it liable in damages to Associates. See *Duane Jones Co., Inc.* v. *Burke, et al., supra. A.S. Rampell, Inc.* v. *Hyster Company, et al., supra.*

This general rule remains applicable even though the employee sought to be enticed away is employed under a contract, written or oral, which is terminable at will and *a fortiori* even if there is no restrictive covenant in such contract of employment. *A. S. Rampell, Inc.* v. *Hyster Company, et al., supra; American League Baseball Club of New York* v. *Pasquel,* 63 N.Y.S.2d 537 (S. Ct. N.Y. Cty. 1946); *Fine* v. *Loew,* 159 N.Y.S.2d 318 (S.Ct. N.Y. Cty. 1957).

Moreover, it is settled law in Florida that the intentional and unjustified interference with an advantageous busi-

ness relationship existing between an employer and its employee which results in injury constitutes a tort. *Dade Enterprises, Inc.* v. *Wometco Theatres, Inc.*, 119 Fla. 70, 160 So. 209 (1935); *Franklin* v. *Brown*, 159 So. 2d 893 (1 D.C.A. Fla, 1964); *John B. Reid & Associates, Inc.* v. *Jimenez*, 181 So.2d 575 (1964); *Mead Corporation* v. *Mason*, 191 So.2d 592 (D.C.A. Fla. 1966). In the *Reid* case, *supra* the Court citing the *Franklin* case, *supra* set out the elements of the tort as follows:

> "[T]he existence of a business relationship under which the plaintiff has legal rights. However, it is specially pointed out that this relationship need not be evidenced by an enforceable contract. Second, that in order to secure an advantage, the defendant, by fraud, induces plaintiff's business associate to act in a way which destroys plaintiff's business relationship. It is specifically noted that this inducement may be by means of the concealment of a fact which the circumstances require that the defendant should reveal. Third, that the plaintiff is damaged as a result of the breach of the business relationship."

In the instant case Associates had a business relationship with Sherman under which Associates had legal rights including, but not limited to, Sherman's obligations of fidelity and loyalty and his duty not to engage in any transaction which tended to bring his personal interest into conflict with his obligations to Associates. Secondly, Busch, in order to secure an advantage, to wit; the continued operation of the Swiss House without interruption during a period when a new operator was to replace Associates and commence management of Swiss House, induced Sherman to act in a manner adverse to his obligations as Associates' employee and to thereby destroy Associates' business at Swiss House. Busch was under a fiduciary obligation to deal honestly with Associates in matters affecting the agency and it, together with Sherman (who was under a

similar obligation to Associates), went to great lengths to conceal the secret negotiations and subsequent agreement between them. Associates was damaged as a result of the breach of its business relationship with Sherman because were it not for that breach Busch would not have been able to affect a change in the management of the Swiss House without substantial business interruption, a factor which might very well have persuaded Busch not to make any change in the management of Swiss House at all.

Associates is entitled to the actual losses sustained by it as a result of Busch's violation of its fiduciary duties and further, based upon Busch's interference with Associates' business relationship with Sherman. There is no evidence that, during 1975, Busch was engaged in negotiations with any other person (other than Sherman) or business entity as respects a successor manager to Associates at Swiss House. That fact, coupled with the reality that a change in management of the Swiss House (other than a change to Sherman) would have caused a substantial interruption in the business of Swiss House, permit, if not compel, the logical inference that if Busch had not violated its fiduciary duties and tampered with Sherman, Associates would have remained as operator of Swiss House through the then current term year which terminated on December 25, 1975. Accordingly, Associates is entitled to recover compensatory damages for its loss of anticipated future profits during the period between July 9, 1975 and December 25, 1975.

POINT V

The District Court erroneously entered judgment in favor of Sherman and Sherman Management Corp.

Neither Sherman nor Sherman Management Corp. was ever served with process in the case nor did either of them appear in the action. Consequently, neither Sherman nor Sherman Management Corp. was a party to the action.

Rule 54 of the Federal Rules of Civil Procedure authorizes the entry of a final judgment as to one or more parties. Clearly, the District Court acted without authority in entering judgment for Sherman and Sherman Management Corp. See *Irwin* v. *West End Development Co.*, 342 F.Supp. 687 (D. Colo. 1972); *Hardware Mut. Casualty Co.* v. *Schantz*, 186 F.2d 868 (5th Cir. 1951); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 89 S. Ct. 1562, 395 U.S. 100, 23 L. Ed. 2d 129 (1969) rev'd on other grounds 91 S. Ct. 795, 401 U.S. 321, 28 L. Ed. 2d, 77 (1971); *Gregory* v. *Stetson*, 10 S. Ct. 422, 133 U.S. 579, 33 L. Ed. 792 (1890); *Keegan* v. *Humble Oil & Refining*, 155 F.2d, 971 (5th Cir. 1946).

POINT VI

Associates is entitled to damages equal to its lost profits in the amount of $158,705 as a consequence of Busch's improper termination of Associates agency and Busch's improper conduct with respect to Sherman.

Under Florida law a corporation may recover damages for the loss of anticipated future profits, when those damages result from a breach of contract, a tort, or other legal wrong. Florida courts have uniformly held that if the business which suffers the loss of anticipated future profits has been in operation for a long enough period of time so that financial records and other data pertaining to those expenses and profits are available, then those financial records and data are to be received as evidence of what the future profits would have been. *Twyman* v. *Roell*, 123 Fla. 2, 166 So. 215 (1936); *New Amsterdam Casualty Co.* v. *Utility Battery Mfg. Co.*, 122 Fla. 718, 166 So. 856 (1935); *Babe, Inc.* v. *Baby's Formula Service, Inc.*, 165 So.2d 795 (Fla., 3 D.C.A. 1964); *Arcade Steam Laundry* v. *Bass*, 159 So.2d 915 (Fla. 2 D.C.A., 1964); *Klosters Rederi A/S* v. *Jamaica Sun Tours, Ltd.*, 270 So.2d 466

(Fla. 3 D.C.A., 1972); and *Kenco Chemical & Mfg. Co.* v. *Railey,* 286 So.2d 272 (Fla., 1 D.C.A., 1973).

The trial testimony of Joseph Kayata (A-391 to A-398), Controller of Associates established that Associates' profit for the period between July 9, 1975 and December 25, 1975 would have been equal to 20.8 per cent of the gross receipts for that period or $158,705 and Associates is entitled to an award of damages in that amount.

CONCLUSION

The Judgment of the District Court, dated November 24, 1976, should be reversed.

Respectfully submitted,

DORNBUSH MENSCH & MANDELSTAM
Attorneys for Appellant Restaurant Associates Industries, Inc.

RICHARD J. SCHAEFFER
Of Counsel

(61305)

Due and timely service of Two copies of the within Brief is hereby admitted this 4th day of April 1977

William J. Gallagher

Attorneys for Appellee